

with a special concern for the schools by having board members be franchised; on the contrary, it vests ownership in a group with no such special concern. When the interests vital to the operation and management of the schools is impaired, a state violates the Equal Protection Clause by vesting control of its educational establishment in those who own a particular class of property.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

APPENDIX

MURRAY HAZEN

10 Chambers Street

New York, New York 10007

Daniel Moore, Jr.

Peter H. Moore

257 1/2 Hunter Street, N. W.

Atlanta, Georgia

Attorneys for Appellants

APPENDIX**Opinion and Order**

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION
(Filed: August 5, 1968)
Civil Action No. 1357

CALVIN TURNER, *et al.*,

Plaintiffs,

—v.—

W. W. FOUCHE, *et al.*,

Defendants.

Before :

BELL, *Circuit Judge* and
SCARLETT and MORGAN, *District Judges.*

PER CURIAM :

This case is quasi-sequential to *Turner v. Goolsby*, S. D. Ga., 1966, 255 F. Supp. 724, also a three-judge matter, and that case is referred to as background. See also *United States v. Jefferson County Board of Education*, 380 F. 2d 385, dissenting opinion, p. 416, fn. 6. These decisions point to the fact that the Taliaferro County school system is de-segregated to the extent that there is only one grammar school and one high school in the entire system but there

are no white children attending the public school system.¹ On the other hand, the school board members are all of the white race. This set of circumstances led to the instant class action brought by a Negro school child and her father on behalf of all Negro residents of Taliaferro County, Georgia, similarly situated. Another father and his five school children were added later as parties plaintiff.

The thrust of the complaint is that the Negroes have no voice in school management and affairs in that there are no Negroes on the school board. It is contended that Art. III, § V, ¶ I of the Constitution of the State of Georgia of 1945, Ga. Code Ann., § 2-6801, and Ga. Code Ann., §§ 32-902, 902.1, 903 and 905, all having to do with the election of county school boards by the grand jury, are unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment and under the Thirteenth Amendment, both facially and as applied by reason of the systematic and long continued exclusion of Negroes and non-freeholders as members of the Board of Education of Taliaferro County, Georgia, and on the selecting grand juries. The same contention is made with respect to the Georgia laws regarding the appointment of and service as jury commissioners. Ga. Code Ann., § 59-101 and 106 (Ga. Laws 1967, p. 251, Vol. 1). Here again unconstitutionality in application is asserted on the basis of

¹ According to the evidence in the instant case, in the 1966-67 school term there were 458 Negro children in the system. There were 72 white children attending a private school in grades one through ten. Cf. the recent Supreme Court decisions involving the desegregation of small rural school systems in Virginia and Arkansas, respectively. *Green v. County School Board of New Kent County, Virginia*, 1968, — U. S. —, 88 S. Ct. —, 20 L. Ed. 2d 716; *Raney v. The Board of Education of the Gould School District*, 1968, 88 U. S. —, — S. Ct. —, 20 L. Ed. 2d 727.

systematic exclusion of members of the Negro race from service as jury commissioner. Unconstitutionality is claimed also by reason of the alleged uncertainty, indefiniteness, and vagueness of the standards set forth in each of the statutes.²

Complainants seek an order declaring the aforesaid Georgia Constitutional provision and statutes unconstitutional on their face and as applied, and they also pray for ancillary money damages in the amount of \$500,000 to compensate them for past deprivations and denials of federal rights. By amendment they pray for attorneys fees.

Defendants named in the complaint are the members of the Board of Education of Taliaferro County and the jury commissioners of Taliaferro County. Additionally, three citizens of Taliaferro County were sued individually and in their capacity as grand jurors of Taliaferro County but they were dismissed by an order entered on January 30, 1968 granting a motion to dismiss for failure to state a claim against them upon which relief could be granted.

A three-judge District Court was convened under 28 USCA, §§ 2281 and 2284. The case was heard on January 23, 1968. The evidence indicated and the court announced then and now so finds that Negroes were being systematically excluded from the grand juries through token inclusion. Jurors were being selected by the jury commissioners from the voter registration lists as required by the Georgia statute, Ga. Code § 59-106, *supra*. The num-

² Another allegation is that the school board has deprived Negro school children of text books, facilities, laboratories, recreation facilities, teaching programs, bus transportation and other benefits to the extent that they are ill equipped to advance in the modern world and are mere peons in the hands of the white race. This allegation fails utterly for want of proof and will be eliminated from the case at this point.

ber of Negro and white voters in the county were substantially the same. It developed that there were 272 whites and 56 Negroes on the traverse jury list; 119 whites and only 11 Negroes on the grand jury list. It appeared also without contradiction that jury commissioners were all white and that the members of the Board of Education were all white. The grand jury situation was such that Negroes had little chance of appointment to the school board.

The hearing was adjourned and Charles J. Bloch, Esq., of counsel for the defendants, was directed by the court, pending the continued hearing, to familiarize the defendants with the provisions of law relating to the prohibition against systematically excluding Negroes from the jury system. The hearing was resumed on February 23, 1968 and Mr. Bloch reported to the court and introduced evidence to the effect that Honorable R. L. Stephens, Judge of the Superior County of Taliaferro County, Georgia, had by order dated January 26, 1968, discharged the grand jury and required that the jury lists, both traverse and grand, be revised in light of the oral pronouncement by this court that the grand jury master list was illegally composed. The jury commissioners were directed by Judge Stephens to immediately recompose the jury lists. The following is from the report filed on behalf of the jury commissioners. This report was substantiated by the testimony of the chairman of the jury commissioners and stands uncontradicted.

"The Jury Commissioners met beginning on the Monday following the order, to wit, January 29, 1968. They had for their consideration the list of persons who were registered to vote in the last general election. That list contained a total of 2,152 names. We are advised that the Jury Commissioners considered each

and every name in that list. When the Commissioners did not have any information with respect to a particular individual, they asked other people in the community about him or her. In particular, when they did not know about persons of the Negro race, they asked Negro people about them. In considering each and every name they eliminated the following numbers of names without regard to race for the following reasons:

Poor Health and over-age	374
Under 21 years of age	79
Dead	93
Persons who maintained Taliaferro County as a permanent place of residence but were most of the time away from the county	314
Persons who requested to be eliminated from consideration	48
Persons about whom information could not be obtained	225
Persons of both the white and Negro race who were rejected by the Jury Commissioners as not conforming to the statutory qualifications for juries either because of their being unintelligent or because of their not being upright citizens	178
Names on voters lists more than once	33

"This left a total of 608 names. Since 608 names are more than the Jury Commissioners deemed to be needed in the traverse jury box, they arranged these

608 names in alphabetical order, and took every other name on the list alternately and placed those names on the traverse jury list. This left a total of 304 names, and only then did the Commissioners look to see how many of these 304 names were those of Negroes and how many were those of whites. They determined that 113 were Negroes and 191 were white.

"Their next task was to select not more than two-fifths of this traverse jury list for the grand jury list. They decided that the fairest system would be to draw names by lot. They drew a total of 121 names by lot and put those names on the grand jury list. Having done that, they looked to see how many were of the Negro race and how many of the white race. They ascertained that 44 were the names of Negroes and 77 were names of whites."

It developed that the jury commissioners were assisted by two Negro residents of the county in making the jury revision. The chairman of jury commissioners agreed that a Negro would be appointed as clerk or secretary to the commissioners until such time as a Negro or Negroes could be appointed to membership on the commission in order that the Negroes of the county, in the meantime, would have some representation in the operation of the jury system.

The court requested the chairman of the jury commissioners to designate by race those persons who were on the voter registration list and who were eliminated from jury service. That was done subsequent to the adjourned hearing with the following result: 71 of the under 21 group were Negroes; 191 of those in poor health were Negroes; 263 of the 533 who were away from Taliaferro County were

Negroes; 171 of the 178 disqualified were Negroes; while only 3 of the 43 persons who requested to be relieved from jury duty were of the Negro race. The other categories were unknown as to race.

After the new grand and traverse jury lists had been completed and after all the names had been put in the respective jury boxes, a new grand jury was drawn by Judge Stevens from the jury box by lot. A total of 32 grand jurors were drawn: 9 Negroes and 23 whites. The grand jury actually serving consisted of 23 grand jurors, 17 of whom were whites and 6 Negroes, the others having been excused by the court.

That grand jury convened on Friday, February 16, for the purpose of considering the regular business of the court and for the purpose of confirming or rejecting persons who had been selected by the Board of Education of Taliaferro County, Georgia, to succeed Horace E. Williams, Jr. for a term to expire August 25, 1968, Mr. Williams having resigned, and to succeed Albert Drinkard, deceased, for a term to expire August 22, 1969. Casper Evans, Sr., a Negro, had been chosen by the Board of Education to serve until the next meeting of the grand jury, and Moore Pittman, who is of the white race, had been chosen by the Board of Education to succeed Albert Drinkard, deceased, for the term expiring August 23, 1969. These choices by the Board of Education were confirmed by the grand jury.

The court finds and concludes that the grand jury list, as revised, is not unconstitutional or illegal. The court finds and concludes that the constitutional provision and the statutes in question are not unconstitutional on their face or as applied. There is nothing in the constitutional provision or in the statutes which contemplates or permits the resulting systematic exclusion from the grand juries. The stand-

ards are not inadequate. The facts showed systematic exclusion in the administration of the grand jury system prior to the revision but this resulted from the administration of the system and not from the constitutional provision and statutes under attack. The court also concludes that the provision requiring that members of the school board be freeholders has not been shown to be an unconstitutional requirement. There was no evidence to indicate that such a qualification resulted in an invidious discrimination against any particular segment of the community, based on race or otherwise.

There is thus no merit in the three-judge District Court questions presented. There remain, however, two single judge questions. One is that of the systematic exclusion of Negroes from the grand juries. This is the question that stems from the manner in which the grand jury system was administered. The court in its discretion will retain jurisdiction over this single judge question and grant such relief as indicated. *Turner v. Goolsby*, supra; and cf. *United States v. Georgia Public Service Commission*, 1962, 371 U. S. 285, 83 S. Ct. 397, 9 L. Ed. 2d 317, to the effect that a three-judge District Court may dispose of a case on a ground that would not have justified calling a three-judge court. The jury commissioners will be enjoined from systematically excluding Negroes from the grand jury system in Taliaferro County. Cf. *Billingsley v. Clayton*, 5 Cir., 1966, 359 F. 2d 13.

The other single judge question concerns the prayer for damages. See 42 USCA § 1983 on the question of damages. Defendants claim a Seventh Amendment right to jury trial if the question is to be considered and we hold that there is merit in this contention. *Dairy Queen, Inc. v. Wood*, 1962, 369 U. S. 469, 8 L. Ed. 2d 44. In view of the cum-

bersom
Distric
by the

37

we dec
ancilla

be involved in a three-judge
and that such is not contemplated
Court statute, 28 USCA, § 2284,
on, to entertain the question of

ers an

of com relief are denied including the
adjour. Costs will be taxed against
the co: members and jury commission-
on thallowed to include the expenses
precip to Brunswick, Georgia for the

Content that may be possible under
the juvol board members are assessed
Thi nduct, in substantial measure,

may present an order enjoining
foresaid.

68.

/s/ GRIFFIN B. BELL
United States Circuit Judge

/s/ LEWIS R. MORGAN
United States District Judge

/s/ FRANK SCARLETT
United States District Judge

Final Judgment

(Filed: September 19, 1968)

On the 15th day of November, 1967, a complaint was filed in the United States District Court for the Southern District of Georgia, Augusta Division, for injunctive relief, declaratory judgment, and ancillary damages, in the above-styled cause. Pursuant to the prayers of the complaint, a three-judge District Court was convened, consisting of the Honorable Griffin B. Bell, Circuit Judge, Honorable Frank M. Scarlett, resident District Judge, and Honorable Lewis R. Morgan, designated District Judge. This cause, having come on for hearing, and having been heard by the Court on the pleadings and proofs of the parties, oral argument of counsel, and briefs of the parties, the Court having entered its opinion, incorporating its findings of fact and conclusions of law, with respect thereto on August 5, 1968, and being advised in the premises.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED, as follows:

I

E. C. Moore, Guy F. Beazley, J. M. Taylor, L. T. Lunceford, Reuben H. Jones, and Clarence Griffith, Individually, and as Jury Commissioners of Taliaferro County, Georgia, and their successors in office, are hereby permanently restrained and enjoined from systematically excluding Negroes from the grand jury system in Taliaferro County, Georgia.

II

Article VIII, Section V, paragraph one of the Constitution of the State of Georgia of 1945, 2 Georgia Code

Annotated, Section 6801, 59 Ga. Code Annotated, Sections 101 and 106; and 32 Georgia Code Annotated, Sections 902, 902.1, 903, and 905 are not unconstitutional on their face or as applied. We decline, in our discretion, to entertain the question of ancillary damages.

III

All other prayers for relief including the prayer for attorneys fees and all motions of the plaintiffs and defendants, except the motion of defendants W. W. Fouche, Rastus Durham, and Elmo Bacon, sued herein individually and as representatives of the class of persons known as Grand Jurors of Taliaferro County, Georgia, which the Court hereinbefore granted, are denied.

IV

Costs, to the extent permitted by law, are assessed in favor of the plaintiffs, including the expenses of the complainants in traveling to Brunswick, Georgia, for the adjourned hearing, against the defendant members of the Board of Education of Taliaferro County, Georgia, and defendant members of the Jury Commission of Taliaferro County, Georgia.

This day of September, 1968.

GRIFFIN B. BELL

United States Circuit Judge

LEWIS R. MORGAN

United States Circuit Judge,

Then United States District Judge

FRANK M. SCARLETT

Senior United States District Judge

Constitutional and Statutory Provisions Involved

1. Article VIII, Section V, paragraph I, of the Constitution of the State of Georgia of 1945:

"Establishment and maintenance; board of education; election, term, etc.—Authority is granted to counties to establish and maintain public schools within their limits. Each county, exclusive of any independent school system now in existence in a county, shall compose one school district and shall be confined to the control and management of a County Board of Education. The Grand Jury of each county shall select from the citizens of their respective counties five freeholders, who shall constitute the County Board of Education. Said members shall be elected for the term of five years except that the first election of Board members under this Constitution shall be for such term that will provide for the expiration of the term of one member of the County Board of Education each year. In case of a vacancy on said Board by death, resignation of a member, or from any other cause other than the expiration of such member's term of office, the Board shall by secret ballot elect his successor, who shall hold office until the next Grand Jury convenes at which time the said Grand Jury shall appoint the successor member of the Board for the unexpired term. The members of the County Board of Education of such county shall be selected from that portion of the county not embraced within the territory of an independent school district.

The General Assembly shall have authority to make provision for local trustees of each school in a county

system and confer authority upon them to make recommendations as to budgets and employment of teachers and other authorized employees."

2. Title 32 Georgia Code Annotated:

"(a) §902. *Membership in County boards.*—The grand jury of each county (except those counties which are under a local system) shall, from time to time, select from the citizens of their respective counties five freeholders, who shall constitute the county board of education. Said members shall be elected for the term of four years, and shall hold their offices until their successors are elected and qualified. Provided, however, that no publisher of schoolbooks, nor any agent for such publisher, nor any person who shall be pecuniarily interested in the sale of schoolbooks, shall be eligible for election as members of any board of education or as county superintendent of schools: Provided, further, that whenever there is in a portion of any county a local school system having a board of education of its own, and receiving its pro rata of the public school fund directly from the State Superintendent of Schools, and having no dealings whatever with the county board of education, then the members of the county board of education of such county shall be selected from that portion of the county not embraced within the territory covered by such local system." (Acts 1919, p. 320.)

"(b) §902.1. *Selection of board members by grand jury.*—The members of the county boards of education in those counties in which the grand jury selects

such members pursuant to Article VIII, Section V, Paragraph I of the Constitution of Georgia of 1945, as amended (Sec. 2-6801), shall be selected by the last grand jury immediately preceding the expiration of the term of the member that the member to be selected will replace." (Acts 1953, Nov. Sess., p. 334.)

"(c) §903. *Qualifications of members.*—The grand jury in selecting the members of the county board of education shall not select one of their own number then in session, nor shall they select any two of those selected from the same militia district or locality, nor shall they select any person who resides within the limits of a local school system operated independent of the county board of education, but shall apportion members of the board as far as practicable over the county; they shall elect men of good moral character, who shall have at least a fair knowledge of the elementary branches of an English education and be favorable to the common school system. Whenever a member of the board of education moves his residence into a militia district where another member of the board resides, or into a district or municipality that has an independent local school system, the member changing his residence shall immediately cease to be on the board and the vacancy shall be filled as required by law. Notwithstanding the foregoing provisions to the contrary, a county may provide by local law that two or more members of the board of education may be selected from the same militia district." (Acts 1919, pp. 288, 321; 1965, p. 124.)

"(d) §905. *Certificate of election; removal; vacancies.*—Whenever members of a county board are elected

or appointed, it shall be the duty of the clerk of the superior court to forward to the State Superintendent of Schools a certified statement of the facts, under the seal of the court, as evidence upon which to issue commissions. This statement must give the names of the members of the board chosen and state whom they succeed, whether the offices were vacated by resignation, death or otherwise. The evidence of the election of a county superintendent of schools shall be the certified statement of the secretary of the meeting of the board at which the election was held. Any member of a county board of education shall be removable by the judge of the superior court of the county, on the address of two-thirds of the grand jury, for inefficiency, incapacity, general neglect of duty, or malfeasance or corruption in office, after opportunity to answer charges; the judges of the superior courts shall have the power to fill vacancies, by appointment, in the county board of education for the counties composing their respective judicial circuits, until the next session of the grand juries in and for said counties, when said vacancies shall be filled by said grand juries." (Acts 1919, p. 322.)

3. Title 59 Georgia Code Annotated:

"(a) §101. *Jury commissioners; appointment; number; qualifications; terms; removal.*—There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall

be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor: Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners." (Acts 1878-9, p. 27; 1887, p. 52; 1901, p. 43; 1935, p. 151.)

"(b) §106. Immediately upon the passage of this Act and thereafter at least biennially, or, if the judge of the superior court shall direct, at least annually, on the first Monday in August, or within sixty (60) days thereafter, the board of jury commissioners shall compile and maintain and revise a jury list of upright and intelligent citizens of the county to serve as jurors. In composing such a list they shall select a fairly representative cross-section of the upright and intelligent citizens of the county from the official registered voters' list which was used in the last preceding general election. If at any time it appears to the jury commissioners that the jury list so composed, is not a fairly representative cross-section of the upright and intelligent citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including upright and intelligent citizens of any significantly identifiable group in the county which may not be fairly represented thereon.

"After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number, not exceeding two-fifths of the whole

number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."